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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SUSAN NASH,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. CV 15-02547-RAO

**MEMORANDUM OPINION AND
ORDER**

Plaintiff Susan Nash (“Plaintiff”) challenges the Commissioner’s denial of her application for disability insurance benefits. Plaintiff contends that the Administrative Law Judge (“ALJ”) improperly considered vocational evidence because the evidence conflicted with the *Dictionary of Occupational Titles* (“DOT”) and the conflict was not identified by the vocational expert (“VE”) and thus not resolved.

It is well settled that an ALJ must “elicit a reasonable explanation” for any conflict between “[o]ccupational evidence provided by a VE and the occupational information supplied by the DOT” “before relying on the VE . . . evidence to support a determination or decision about whether the claimant is disabled.” Social

1 Security Ruling (“SSR”) 00-4p, *available at* 2000 WL 1898704, at *2 (Dec. 4,
2 2000); *see also* *Massachi v. Astrue*, 486 F.3d 1149, 1152-53 (9th Cir. 2007).
3 Further, the ALJ “must resolve the conflict by determining if the explanation given
4 by the VE . . . is reasonable and provides a basis for relying on the VE . . .
5 testimony rather than on the DOT information.” SSR 00-4p, at *4. “The
6 adjudicator will explain in the determination or decision how he or she resolved the
7 conflict.” *Id.*

8 At the administrative hearing on Plaintiff’s application, held on March 3,
9 2014, the VE testified that Plaintiff could perform certain jobs at the “light,
10 unskilled work” level with “sit/stand options at 30-minute increments,” specifically,
11 the jobs of production solder, information clerk, or ticket seller. (AR 68-69.) The
12 VE stated that her testimony was consistent with information found in the DOT.
13 (AR 70.)

14 Plaintiff contends that there is a conflict between the VE’s testimony and the
15 DOT, because the proposed jobs identified by the VE are silent as to whether they
16 can be performed with the additional restriction of a “sit/stand option at 30-minute
17 increments,” a restriction that the ALJ incorporated into Plaintiff’s residual
18 functional capacity (RFC) (AR 26). *Jt. Stip.* at 7-10. Plaintiff further contends that,
19 because the VE failed to offer any explanation why the jobs she identified could
20 accommodate a sit/stand option, the ALJ improperly relied on this vocational
21 evidence and committed legal error. *Id.*

22 The Commissioner disagrees. First, the Commissioner states that Plaintiff
23 waived this argument when her counsel at the administrative hearing failed to raise
24 the issue. *Jt. Stip.* at 14. To the extent the Commissioner contends that Plaintiff
25 waived her claim by failing to raise the alleged error at the administrative level, the
26 contention lacks merit. *See Harrison v. Colvin*, EDCV 15-1362-E, 2016 WL
27 1258447, at *4 (C.D. Cal. Mar. 30, 2016) (holding no waiver of plaintiff’s step four
28 argument where plaintiff did not object to such errors at the hearing); *see also Alba*

1 v. *Berryhill*, EDCV 15-2524-SP, 2017 WL 1290484 (C.D. Cal. April 4, 2017)
2 (finding no waiver of step five claim because counsel failed to question the VE
3 about potential conflict with DOT at administrative hearing). Thus, the Court finds
4 Plaintiff's claim is not waived.

5 Second, the Commissioner disagrees with Plaintiff's premise that a conflict
6 inherently exists where the DOT is silent about whether a sit/stand restriction is
7 compatible with a particular job description. Jt. Stip. at 11-14. In support of its
8 argument, the Commissioner relies on two cases: *Ruiz v. Colvin*, 638 F. App'x 604,
9 607 (9th Cir. 2016), and *Buckner-Larkin v. Astrue*, 450 F. App'x 626 (9th Cir.
10 2011). The Court disagrees with the Commissioner and concludes that *Ruiz* and
11 *Buckner-Larkin* compel remand in this matter.

12 In *Ruiz*, the claimant alleged that the ALJ erred in relying, in part, on the
13 testimony of the vocational expert. 638 F. App'x at 606-07. In being asked about
14 the sit/stand option and the claimant's use of a walker, the vocational expert
15 testified that his opinion was consistent with the DOT, that the claimant could
16 perform the jobs identified by the expert even with the walker, and critically for
17 purposes of the instant matter, stated that his "opinion related to [claimant's] use of
18 the walker at the proposed jobs was based on his experience placing people in those
19 jobs as a vocational rehabilitation counselor." *Id.* at 607. The Ninth Circuit found
20 the ALJ's decision was supported by substantial evidence and not based on legal
21 error. *Id.*

22 In *Buckner-Larkin*, the claimant alleged that the ALJ committed error in
23 relying on the vocational expert's testimony which conflicted with the DOT. 450
24 F. App'x at 628. The vocational expert in that case found that the jobs
25 recommended by the expert would allow for an at-will sit-stand option. *Id.* In
26 particular, the expert testified that "*although the DOT did not discuss a sit-stand*
27 *option*, his determination was based on his own labor market surveys, experience,
28 and research." *Id.* (emphasis added). On this record, the Ninth Circuit determined

1 that the “conflict between the DOT and the vocational expert was addressed and
2 explained by the vocational expert, and the ALJ addressed this in the decision.” *Id.*
3 at 628-29.

4 The cases cited by the Commissioner differ in one important factual matter
5 from Plaintiff’s case: in both *Ruiz* and *Buckner-Larkin*, the vocational expert
6 provided an explanation addressing the conflict between the DOT and the proposed
7 jobs identified by the experts. While it is true that the expert in *Ruiz* said there was
8 no conflict, any error associated with that statement was harmless because the *Ruiz*
9 expert provided a reasonable explanation to support his conclusions and thus
10 satisfied the requirements of SSR 00-4p and *Massachi*. Further, the Court finds
11 that *Buckner-Larkin* supports Plaintiff’s argument. The expert in *Buckner-Larkin*
12 noted the conflict with the DOT (“although the DOT did not discuss a sit-stand
13 option”) and then provided an explanation for his opinion, thereby satisfying the
14 requirements of SSR 00-4p. By contrast here, the VE did not acknowledge the
15 conflict and thus offered no explanation. This was error.

16 On the instant record, the Court is unable to conclude if the ALJ’s error was
17 inconsequential to the determination that Plaintiff is not disabled. *See Molina v.*
18 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (“[A]n ALJ’s error is harmless where it
19 is inconsequential to the ultimate nondisability determination”). Accordingly, the
20 circumstances of the case warrant remand for further administrative proceedings to
21 resolve the conflict between the VE’s testimony and the DOT.

22 Accordingly, IT IS ORDERED that Judgment shall be entered REVERSING
23 the decision of the Commissioner denying benefits, and REMANDING the matter
24 for further proceedings consistent with this Order.

25 DATED: April 28, 2017



ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

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NOTICE

**THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,
LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.**